

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1232
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF116

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. MAUS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Langlade County:
WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Brian Maus appeals an order denying his WIS. STAT. § 974.06 (2011-12),¹ postconviction motion without a hearing. Because we

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

conclude the motion was procedurally barred and Maus failed to allege specific non-conclusory facts to establish sufficient reason for his failure to have raised the issues in his earlier postconviction proceedings, we affirm the order.

BACKGROUND

¶2 In 2007, a jury convicted Maus of two counts of attempted battery by a prisoner as a repeater. The jury found Maus attempted to strike one jail officer and attempted to bite another during cell extractions. Maus's initial postconviction proceedings resulted in a no-merit report. Maus filed a response to the no-merit report, arguing: (1) the trial court lacked subject-matter and personal jurisdiction due to defects in the complaint and the preliminary hearing; (2) the court did not follow mandatory procedures regarding Maus's waiver of counsel; (3) the court erroneously denied Maus's request to call various witnesses; (4) the State failed to retain the glove the officer was wearing during the biting incident; and (5) the State failed to present sufficient evidence to support the convictions. This court rejected Maus's arguments and concluded there were no arguable issues for appeal. The Wisconsin Supreme Court denied Maus's petition for review.

¶3 Maus then filed a petition for a writ of habeas corpus, alleging ineffective assistance of no-merit counsel. This court summarily denied Maus's petition because it was based on the same arguments this court rejected in the no-merit decision. The Wisconsin Supreme Court denied Maus's petition for review.

¶4 Maus then filed the present postconviction motion raising the same issues and numerous new issues. The circuit court denied the motion, concluding Maus's claims were entirely conclusory and were not accompanied by specific facts that, if true, would entitle him to relief.

DISCUSSION

¶5 The court may deny a postconviction motion without a hearing if the motion does not show the defendant is entitled to relief or presents only conclusory allegations. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Whether a motion is sufficient on its face to entitle a defendant to an evidentiary hearing is a question of law that we decide de novo. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We determine the sufficiency of the defendant's motion by examining the four corners of the postconviction motion. *Id.* When the defendant has had a previous postconviction motion or appeal, any subsequent motion must establish sufficient reason for the defendant's failure to have raised the issue in the earlier proceedings. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

¶6 Claims that were adjudicated or could have been adjudicated in prior postconviction proceedings are procedurally barred absent a showing of sufficient reason for allowing a successive postconviction motion. *Id.* at 173. The bar to serial litigation also applies if the earlier proceedings resulted in a no-merit report, provided the no-merit procedures were properly followed. *State v. Allen*, 2010 WI 89, ¶62, 328 Wis. 2d 1, 786 N.W.2d 124.

¶7 The issues Maus raised in his response to the no-merit report cannot be re-litigated no matter how artfully they are rephrased. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Maus does not identify any defect in the no-merit process that would allow further argument of those issues.

¶8 In his postconviction motion, Maus raised the following issues that were not addressed in the no-merit proceeding: (1) his no-merit counsel was

ineffective because he conspired with the State, the judge, and the police to cover up the officers' wrongdoing; (2) the jailers illegally videotaped him in his cell; (3) the officers conspired to illegally extract him from his cell; (4) the district attorney conspired to charge Maus with crimes to cover up police misconduct; (5) the court did not allow Maus adequate access to a law library even though he represented himself; (6) the State illegally intercepted Maus's oral communications; (7) the trial judge made disrespectful comments; (8) the district attorney had improper communication with the jury as evidenced by the fact that he only lost one jury trial in twenty years; and (9) newly discovered evidence. With the exception of newly discovered evidence, Maus offers no reason for his failure to have raised these issues in his response to the no-merit report. Therefore, the issues are procedurally barred.

¶9 Maus contends he has three documents that constitute newly discovered evidence. To establish newly discovered evidence, Maus must show by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) he was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *See State v. Armstrong*, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. If Maus satisfies these requirements, the court must then determine whether a reasonable probability exists that a different result would be reached in a new trial. *Id.* A reasonable probability exists if it is probable that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to Maus's guilt. *State v. Love*, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62. The newly discovered evidence cited in Maus's postconviction motion does not meet these standards.

¶10 Maus contends jail documents establish the officers' motive for fabricating evidence because they relate to Maus's disrespect and disruptiveness. The jail documents are not included with Maus's motion. Rather, he purports to quote from the reports without identifying the officers who made the reports. Therefore, the motion does not adequately address who made the remarks in question. *See Allen*, 274 Wis. 2d 568, ¶23 (To meet the standards set forth in *Bentley*, a postconviction motion should identify who, what, where, when, why and how with specificity). In addition, Maus was aware of his own disruptive behavior, and it was obvious that jail officials considered him disruptive. The attempted batteries occurred during cell extractions after Maus obstructed the video cameras in his cells. The jail documents would not have probably led to acquittal and do not undermine our confidence in the jury's verdict or the no-merit process.

¶11 The second document identified by Maus as newly discovered evidence is the jail's cell extraction policy. The jail officers' failure to follow the cell extraction policy, if any, would not constitute a defense to the charges. An inmate is not privileged to attempt to strike or bite an officer who fails to follow the cell extraction policy.

¶12 Maus's third item of newly discovered evidence consists of officers' reports indicating that some of the officers present during the cell extraction did not see the biting incident. That an individual witness did not see an event does not mean it did not occur. An audio recording of the biting incident includes Maus's statement that he tried to bite an officer. Written reports by other officers present stating that they did not see Maus's attempt to bite the officer would not probably lead to acquittal and do not undermine our confidence in the verdict or the no-merit process.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

